Supreme Court, U.S.
FILED

No 03 823 DEC 2 2003

In the Supreme Court of the United States

IRENE PREOBRAZHENSKAYA,

v.

MERCY HALL INFIRMARY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Irene Preobrazhenskaya
5610 Hobart St. #1
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Petitioner

63 pp

QUESTIONS PRESENTED

When an employer fires an employee after her reporting the employer to the Department of Labor Wage and Hour Division ("DOL") for refusing to pay overtime compensation, the anti-discrimination provisions contained in the Fair Labor Standards Act ("FLSA") make such discharge unlawful. 29 U.S.C. § 215(a)(3). The questions presented in this case are:

1. Whether the employer, who admitted to the violations of overtime provisions of the FLSA, could defeat a casual link between employee's protected activity and employer's adverse action (firing employee) to prevail on its motion for summary judgment by having its executive responsible for the termination signed a verification that the executive was not aware of employee's complaint to the Department of Labor. The employer concedes that the same executive knew that the underlined violations of overtime provisions of the FLSA took place.

2. Whether, under the FLSA, the direct evidence of discriminatory intent on the part of the executive responsible for firing employees an absolute prerequisite and said discriminatory intent could not be shown indirectly by affording the employee benefits of all reasonable inferences to be drawn from evidence of the record.

3. Whether, the issue of respondent's intent at the time of petitioner's discharge is a factual question that represents a genuine issue of material fact as to employer's reason for discharging employee and, thus, precludes summary judgment for employer.

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In the Supreme Court of the United States

No.

IRENE PREOBRAZHENSKAYA, Petitioner

v.

MERCY HALL INFIRMARY, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Irene Preobrazhenskaya petitions for a writ of certiorari to review the Judgment of the United States Court of Appeals for the Third Circuit.

LIST OF PARTIES IN COURT BELOW

1. Irene Preobrazhenskaya, Petitioner
2. Mercy Hall Infirmary, Respondent

OPINIONS BELOW

The Opinion of the United States Court of Appeals (App., *infra,* 4a-13a) and the opinion of the United states District Court for the Western District of Pennsylvania (App., *infra,* 15a-39a) are attached hereto.

JURISDICTION

The judgment of the court of Appeals was entered on July 30, 2003. A timely filed petition for rehearing was denied on September 5, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATION INVOLVED

The relevant portions of the Section 15 of the Fair Labor Standards Act of 1938, U.S.C., Title 29, Sec., 215(a)(3) are not lengthy and reproduced verbatim in this petition.

STATEMENT

Beginning in 1992 and continuing until July 30, 1999, the petitioner was employed at the Mercy Hall Infirmary, (hereinafter the "Company"), as a full time Licensed Practical Nurse (LPN) at the Company's Nursing Station. During that time, petitioner was subjected to the terms and conditions of employment set forth in the Employee Handbook which provided for overtime pay when an employee worked more than eight hours a day or more than forty hours in a five-day period. The overtime rate was one and one-half times the base rate of the employee's hourly rate. While petitioner was assigned to work in the Company's Nursing Station, she had been requested by her supervisor, a Registered Nurse and individual in charge at the respondent's place of business to accept overtime work assignments. During this time, the Company had employed the petitioner longer than 40 hours during a five-day period and in excess of 80 hours during a 14-day period. The Company has failed and refused to compensate the petitioner for such excess hours at any rates greater than the regular rates at which she was employed. Following the Formal Complaint Procedure set forth in the Employee Handbook, the petitioner brought these facts to the attention

of her immediate supervisor, Company's head of payroll department and its director of human resources. Instead of addressing the petitioner's overtime compensation concerns, these three individuals retaliated by taking away petitioner's earned personal days, denying petitioner's vacation request and warning the petitioner that Company will be "getting rid of petitioner for good" if petitioner would continue complaining. Beginning September 1, 1998, the Company had developed and implemented the "Waiver of Overtime" Form wherein Company's employees were forced to waive their right for overtime pay resulted from hours worked in excess of forty during the workweek. Implementation of such waiver has effectively nullified the overtime standards imposed by the FLSA, and is contrary to the purpose of the Act, which provides standards to statutorily minimum wages and maximum hours.

On March 23, 1999, the petitioner contacted the Pittsburgh Office of the Department of Labor Wage and Hour Division (DOL), to intervene on her behalf. As a direct result of said intervention, on March 24, 1999, the Company admitted violation of the FLSA and entered into Conciliation Agreement to pay petitioner overtime due under the FLSA. Immediately thereafter, petitioner, while at work for the Company, was approached by her immediate supervisor who warned petitioner that she would be subjected to severe disciplinary action for complaining to federal authorities and that the Company would terminate her employment if petitioner continue complaining. On that occasion, petitioner's supervisor had stated that petitioner's complaining to federal authorities forced the Company to pay overtime to petitioner against supervisor's will.

Petitioner's supervisor further forewarned the petitioner that she would take action to recover overtime payments on behalf of the Company. Then, to make good on her threats and in retaliatory manner, petitioner's supervisor, whose responsibility included scheduling petitioner's work, had

shortened petitioner's workweek exactly to offset overtime pay due to petitioner.

Shortly thereafter, the Company had refused petitioner holiday payments, which were promised upon petitioner's hiring and said payments were regularly made to petitioner during the seven years preceding the petitioner's filing her complaint with the DOL on March 23, 1999. Then, on May 30, 1999, petitioner brought these facts to the attention of Company's Office of Vise-President. In her letter, the petitioner emphasized the retaliatory nature of supervisor's actions and growing necessity to report again the continued violations. On July 27, 1999, the Company terminated petitioner's employment and advised petitioner that she had being discharged for complaining about supervisor's actions and that the Company does not tolerate such conduct. On July 10, 2001, petitioner filed her original Complaint against the Company alleging that her employment was terminated in retaliation for filing a Wage and Hour complaint against the Company with the Department of Labor (Count I). On January 14, 2002, petitioner filed Amended Complaint adding claims for breach of contract, detrimental reliance and violation of public policy (Counts II, III, and IV). On or about July 15, 2002, the district Court granted respondent's motion to dismiss Counts II, III, and IV of the amended complaint and respondent's motion for summary judgment, which pertains to Count I of the Complaint. App., *infra*, 15a. On August 8, 2002, the petitioner timely brought her appeal to the United States Court of Appeals For the Third Circuit. The United States Court of Appeals for the Third Circuit affirmed the District Court's decision on July 30, 2003. The petitioner's timely filed petition for rehearing was denied on September 5, 2003. App., *infra*, 1a.

REASONS FOR GRANTING THE PETITION

To simplify the matter, this petition is limited to review allegations set forth in Count I of the complaint. In Count I of her complaint, the petitioner alleges that the Company violated the anti-discrimination provisions of the Fair Labor Standards Act ("FLSA"). The Section 15(a)(3) of the Fair Labor Standards Act of 1938 defines as a prohibited act:

> **to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.** 29U.S.C.§215(a)(3)

The petitioner decided to limit this review to a District Court's grant of summary judgment on Count I, the FLSA based retaliation claim, because the evidence supporting nexus between petitioner reporting her employer to the DOL and closely followed termination of petitioner's employment is overwhelming. To uphold the Magistrate Judge's incorrect interpretation of the FLSA is a blunt miscarriage of justice.

More specifically, the decision below should be reviewed because it erroneously interprets the FLSA so as to permit encroachment by the judiciary on an area committed by the Constitution to discretion of a jury.

As petitioner notes below, it is refutable, whether it is consistent with the FLSA, U.S.C.29, §201 et seq., when the employer can summarily defeat the anti-discrimination provisions of the FLSA by deferring the firing decision to a straw decisionmaker who either deliberately ignorant or just willing to sign a false verification. Such a

loophole should not be consistent with the public interest to protect workers who complained to the Deportment of Labor when they were underpaid.

The court of appeals acknowledged that "[i]n order to establish a prima facie case of discriminatory retaliation, a plaintiff must show that (1) the petitioner engaged in protected activity, (2) the employer took an adverse employment action against her, and (3) there was a causal link between the petitioner's protected action and the employer's adverse action." App., *infra*, 8a.

But, the court below upheld incorrectly the Magistrate Judge's decision that the petitioner "failed to established a prima facie case because she did not show the casual link between her protected activity (contacting the Department of Labor's Wage and Hour Division) and her employer's adverse action (firing her)". *Id.* In its opinion, the court below explains that the person who allegedly fired the petitioner, Susan "Welsh, Vise-President and Treasurer of the Company, provided a verification that she was unaware that petitioner had contacted the Department of Labor when she decided to terminate her employment". The court of appeals concluded that " It is significant for our review that the record does not reveal any direct evidence establishing that Welsh knew that Preobrazhenskaya [petitioner] had contacted the Department of Labor" *Id.* at 9a.

From petitioner's standpoint, it is significant that the same court of appeals in *Chipollini v. Spencer Gifts*, Inc. 814 F.2d 893 (3rd Cir. 1987) condemned this approach reviewing a grant of summary judgment in case of age discrimination resulted in retaliatory firing of an employee, a member of the protected class. In *Chipollini*, the employer supported its summary judgment motion with a sworn affidavit signed by a company president, Mr. L. Eugene Brog. In his affidavit, Mr. Brog attesting to a legitimate, non-discriminatory reasons for getting rid of the employee citing "uncooperative attitude" *Id* at 896. In *Chipollini*, the United States Court of

Appeals for the Third Circuit agreed with the plaintiff and overturned the district court decision. The court of appeals precluded the grant of summary judgment based on verification by the company executive. The court of appeals stated that "employer is not entitled to summary judgment merely by showing the plaintiff's inability to prove by *direct* [italicized in original] evidence that the defendant's proffered reason is a pretext for ... discrimination. Because, the plaintiff may meet in alternate ways his burden..., the plaintiff is entitled to show that the employer's explanation was pretextual by proffering evidence which is circumstantial or indirect as well as that which shows directly discriminatory animus ("smoking gun evidence"). *Id.* at 895. By this language, the United States Court of Appeals for the Third Circuit recognized that "in most cases, specific intent to discriminate will not be demonstrated by "smoking gun" evidence." *Id.* at 987 (citing *Gavalik v. Continental Can Co.*, 812 F.2d 834, 853-854 (3d Cir. 1987)). Because "most employment discrimination cases direct evidence of employer's motivation is unavailable or difficult to acquire, the [Supreme] Court [has] articulated a method of proof that relies on presumptions and shifting burdens of production" *Id.* (citing *Dillon v. Coles*, 746 F.2d 998, 1003 (3d Cir. 1984).

Contrary to own rule of precedent set forth in *Chipollini* and based on Welsh's verification alone, the court of appeals ignored any other evidence, direct and indirect, holding that petitioner failed to establish that Welsh's motive for terminating petitioner's employment was her reporting the Company to the Department of Labor. The court below erroneously upheld summary judgment where a motive or intent behind the decision to terminate petitioner's employment is at issue. Motive or intent behind the act is a question of fact reserved for a jury and not be resolved by the judiciary. It is up to a jury to decide whether to believe Welsh's sworn verification or to uphold petitioner's version of facts. While the jurors might

disbelieve petitioner's story, petitioner is not disqualified as a matter of law, from telling it to them. The courts have held that when a question of motive or intent is involved, it is the question of fact and summary judgment is inappropriate.

The *Chipollini* speaks loud and clear for cases of employment discrimination and beyond. "The issue of the defendant's intent at the time of the plaintiff's discharge is clearly a factual question. The Supreme Court recently reaffirmed the Lord Justice Bowden's treatment of the problem a century ago:

> **"The state of man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much as a fact as anything else."** ***Edgington v Fitzmaurice,*** **29 Ch. Div. 459, 483 (1885).**

Aikens, 460 U.S. at 716-17, 103 S.Ct. at 1482-83. Thus, by pointing to evidence which calls into question the defendant's intent, the plaintiff raises an issue of material fact which, if genuine, is sufficient to preclude summary judgment." *Id* at 899.

By blindly upholding Welsh's verification that she was unaware about petitioner's protected activity, the court below disregarded the following petitioner's pointed evidence "call[ing] into question the defendant's intent" *Id.*

1. The Company, the petitioner's employer as a business entity, was aware that petitioner reported to the Department of Labor Wage and Hour Division that she was denied overtime pay. Upon petitioner's report to the DOL, the Company, admitted to violations of the overtime provisions of the FLSA and entered into a Conciliation Agreement with the DOL to pay petitioner overtime due under the FLSA. The Company's knowledge of the

petitioner's protective activity should be imputed to Welsh, the Company's Vice President and Treasurer.

2. The Company's officers, particular its director of human resources, head of payroll department, legal advisor, and petitioner's supervisor were negotiating the Conciliation Agreement with the DOL, implementing overtime policies and paying
overtime due under the FLSA. These officers were under direct control and in direct line of supervision to Welsh. There was no other mid-layer of bureaucracy between the first line of management and Welsh. The Company officers' knowledge of the petitioner's protective activity should be imputed to Welsh, the Company's Vice President and Treasurer.

3. Welsh was the Company's executive who approved the Conciliation Agreement that her legal advisor negotiated with the DOL. Her legal advisor requested the copies of petitioner's complaint from the DOL. Welsh either knew or should have known about the petitioner's reports to DOL. Welsh had access to petitioner's personal
file containing the DOL reports when she made her decision to terminate petitioner's employment. The knowledge received by the Company from the DOL about the
petitioner's protective activity should be imputed to Welsh, the Company's Vice President and Treasurer.

4. Welsh, the Company's Treasurer, knew that her financial policies to avoid paying overtime compensation violated the law. Some four months prior to petitioner's reporting her employer to the Department of Labor Wage and Hour Division, Welsh received a Confidential Memorandum from the Company's head of payroll department. He advised Welsh that

> **We should NOT pay Irene** [petitioner] **overtime. This has the potential for opening up similar future problems once "word gets around."** (Quotation marks are in original).
> **If Irene really pushes the issue, by law, we probably have to pay her overtime because the numbers show she worked over 40 hours** App., *infra*, 40a.

5. Welsh consulted both her legal advisor (William Milburn) and her head of payroll department (Charles Mrozinski) on final draft of the termination letter. They both, Milburn and Mrozinski, being aware of petitioner's complaint to the DOL, made corrections and suggestions to Welsh's signed termination letter. It is certain that because of petitioner's reports to DOL, both officers together with Welsh discussed the petitioner's matter before signing the termination letter. App., *infra*, 42a.

Contrary to the court of appeals assertion of "ample evidence of the deterioration of the relationship between the parties arising from causes other than Preobrazhenskaya's complaint to the Department of Labor", there was none existed independently from, occurred as a proximate result of, or could not be logically connected to the petitioner protected activity. All such "ample evidence of the deterioration" surfaced either around the petitioner's reports to the DOL or right after that. Such "ample evidence" is a pattern of progressed discrimination arising out of petitioner's cooperation with the DOL. First, the Company denied petitioner overtime pay, then readjusted and eliminated her personal days, refused her vacation, denied holiday pay and finally, when petitioner threatened to go to the DOL again, the Company terminated petitioner's

employment. It was done in exemplary way to have very serious chilling effect on other employees who worked in excess of 40 hours, but never get overtime compensation paid. In this case, the court of appeals erred by failing to afford employee benefit of all reasonable inferences to be drawn from the evidence of the record. In opposing the summary judgment motion, the petitioner just like the plaintiff in *Chipollini,* "presented specific evidence which supports his position that the defendant's proffered reason is unworthy of credence. This evidence, if credited by the factfinder at trial, would be sufficient to meet *Chipollini*'s [and petitioner's based on holding in *Chipollini*] burden to counter the defendant's reasons as pretextual". Based on framework set forth in *Chipollini,* " a genuine issue of material fact is raised" *Id* at 900.

The court of appeals overlooked the *Chipollini* case and held the petitioner to a wrong standard. The court of appeals placed a burden on petitioner to show a direct evidence of establishing that Welsh, an alleged decisionmaker, knew that petitioner had contacted the DOL. This is, by far, a much harder burden to overcome, and is not required to defeat a summary judgment motion. When review a grant of summary judgment *de novo,* the court of appeals "must examine all the evidence in light most favorable to the non moving party [petitioner in this case] to determine if there is a genuine issue of material fact. *Orsatti v. New Jersey State Police,* 71 F.3d 480, 482 (3d Cir. 1995). In determining whether a dispute is genuine, the court's function is to decide "whether the evidence of record is such that a reasonable jury could return a verdict for the nonmoving party." App. *infra,* 8a. Since respondent is not a nonmoving party, there is no reason to examine Welsh's verification in most favorable light. To the contrary, a reasonable jury has all reasons in the world to question truthfulness of a verification when there is an ample evidence of progressing retaliatory animus in light of the

Company's desire to rid itself from the complaining employee. It is even more so, when the alleged violations are Company wide combined with the Welsh's desire to cover it up by terminating a whistleblower. Clearly, the reasonable jury could go either way and possibly return a verdict for the petitioner.

The controlling test is different than the one used by the court of appeals. Where an employee requests that his or her employer pay overtime or merely inquires about potential violation of the FLSA, the employee engages in protected activity within the meaning of the Section 15(a)(3). The assertion of rights and not the fact of a violation gives rise to the protection against retaliation. Thus, an employee who asserts rights under the FLSA needs not to prove a statutory violation of the act to prevail under Section 15(a)(3). An employee who even acts on a good faith but mistaken belief that the employer's conduct is illegal may not be subjected to discharge or other retaliation. *McKenzie v. Renberg's Inc.*, 94 F.3d 1478 (1996) *cert. denied*, 520 U.S. 1186 (1997). When an employee, like in this case, has direct evidence of adverse employment actions suggesting that her employer was motivated by retaliatory animus, the burden shifts to the employer to prove that it would have taken the challenged adverse action even if the employee had not engaged in protective activities. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04, 93 S.Ct. 1817 (1973), *Counteras v. Corinthian Vigor Ins. Brokerage, Inc.*, 103F.Supp. 2d 1180,1184 (N.D. Cal. 2000). In its decision in this case, the court of appeals ignored the *McDonnell* standard requiring to show that the petitioner would have lost her job for reasons other than her reporting the Company to the DOL.

The court below sought to avoid the tough questions raised by *McDonnell*, compelling the respondent to articulate the other viable and independent reasons for the Company to terminate petitioner's employment even if she was not engaged in protective activity. The court of appeals ignored the burden-shifting framework established in

McDonnell. Instead, the court of appeals erroneously applied the facts of this case against the framework of *Jones v. School District of Philadelphia*, 198 F.3d 403,415 (3d Cir. 1999). In *Jones*, the United States Court of Appeals for the Third Circle "affirmed a grant of summary judgment on a retaliation claim under Title VII where there was no evidence that the principals who made the decision to fire the petitioner were aware of the protected action". App, *infra*, 9a. The court of appeals gave a full credit to Welsh's self-serving verification where Welsh stated that she "was solely responsible for the decision to terminate Preobrazhenskaya and that at that time she was unaware that Preobrazhenskaya had contacted the Department of Labor". *Id.* The procedural problem aside, the petitioner believes that *Jones* can be easily distinguished from the instant case. In *Jones*, a schoolteacher and a plaintiff, was not fired, like petitioner in instant case. He rather resigned and claimed later that his resignation is amounted to constructive termination followed the complaint he filed with the Pennsylvania Human Relation Commission. In contrast, the petitioner was fired on the job, escorted from the job site in front of the fellow workers to show what happened to those who complain to the government.

In *Jones*, the person who made a decision to fire Jones was a **new** school principal. It was a new person who was brought to school **after** Jones filed his complaint. Presumably, the new principal was not aware of Jones' complaint. The rationale in *Jones* is simple. The employee's protective activity did not occur under principal's watch, who might not be a retaliator simply because he might be unaware of the complaint. The court in *Jones* reasoned that because an alleged retaliator, a person who made a decision to terminate the employment, was not around when the complaint was filed, the knowledge should not be imputed to him and the decisionmaker could not be held accountable for something he might not know.

In the instant case there is no such concern. Welsh, the alleged decisionmaker, was not new to the petitioner's overtime complaints. Welsh was well aware of the overtime situation. Under Welsh's watch, the Company decided to cut corners and stopped paying overtime in violation of the overtime provisions of the FLSA. Welsh approved the Conciliation Agreement with the government to pay petitioner overtime due under the FLSA. She orchestrated the termination procedures. Before terminating the petitioner, Welsh contacted attorneys at Buchanan Ingersoll, PC (respondent's counsel in this case). As diligent and thorough as they are, respondent's attorneys reviewed Irene Preobrazhenkaya employee's file which contained petitioner's Wage and Hour complaint, including the information Company's legal advisor requested from the DOL immediately after the Company entered into the Conciliation Agreement. App. *infra*, 43a. Undoubtedly, Welsh was in the position to know and she knew about petitioner's contacts with the DOL. Moreover, as a Company's treasurer, she also approved payment of overtime. Clearly, Welsh's claim that she somehow did not know about petitioner's protective activity does not fit the factual pattern of *Jones* where the decisionmaker was brought **after** the Jones filed his complaint. The new decisionmaker feasibly could not be aware of protective activity. Lack of knowledge of a protective activity was a rational in *Jones* to affirm a grant of summary judgment. The Welsh was not a new decisionmaker. Welsh knew about the violation of overtime provision of the FLSA and the ensued petitioner's complaints to the DOL. The *Jones* precedent used to affirm a grant of summary judgment when the newly hired or brought in decisionmaker is unaware of the situation is not applicable in this case.

The question presented by this case is of great and recurring significance in the administration of the Fair Labor Standards Act and elsewhere. The decision below seems to suggest that the Company can easily defeat anti-

discrimination provisions and rid itself from those who asserted or attempted to assert rights arising under the FLSA by simply deferring firing decision to a purposely ignorant decisionmaker. Such employer thought through scheme would take teeth from any federal anti-discrimination statute. The serious questions of public policy involved in this case, and the effect of the decision below, if unreversed, make this case a particularly appropriate for the exercise of this Court's discretionary jurisdiction.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Irene Preobrazhenskaya,
Petitioner

December 2003.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT
No 02-3190

IRENE PREOBRAZHENSKAYA,
Appellant

v.

MERCY HALL INFIRMARY,
a/k/a Sisters of Mercy

SUR PETITION FOR REHEARING

Present: SCIRICA, Chief Judge, SLOVITER, NYGAARD, ALITO, ROTH, McKEE, BARRY, AMBRO, FUENTES, SMITH, CHERTOFF, Circuit Judges, and TUCKER,* District Judge

The petition for rehearing filed by Appellant Irene Preobrazhenskaya, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,
/s/ Dolores K. Sloviter
Circuit Judge

Dated: 09/05/03
CMH/cc: AK, PJR, JSB

* Hon. Petrese B. Tucker, United States District Court for the Eastern District of Pennsylvania, sitting by designation, as to panel rehearing only.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 02-3190

IRENE PREOBRAZHENSKAYA,

Appellant

v.

MERCY HALL INFIRMARY,
a/k/a Sisters of Mercy

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 0l-cv-01258)
District Judge: Hon. Robert J. Cindrich

Before: SLOVITER and AMBRO, Circuit Judges, and
PETRESE B. TUCKER*, District Judge

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was submitted pursuant to Third Circuit
LAR 34.1(a) on June27, 2003.

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* Hon. Petrese B. Tucker, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

On consideration whereof, it is now here ORDERED AND ADJUDGED by this Court that the order of the said District Court entered March 15, 2002 be, and the same is, hereby affirmed. Costs taxed against Appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/Marcia M. Waldron
Clerk

Dated: July30, 2003

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 02-3190

IRENE PREOBRAZHENSKAYA,
Appellant

v.

MERCY HALL INFIRMARY,
a/k/a Sisters of Mercy

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No. 0l-cv-01258)
District Judge: Hon. Robert J. Cindrich

Submitted Under Third Circuit LAR 34.1(a)

June 27, 2003

Before: SLOWTER and AMBRO, Circuit Judges, and
PETRESE B. TUCKER*, District Judge

(Filed July 30, 2003)

OPINION OF THE COURT

* Hon. Petrese B. Tucker, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

SLOVITER, Circuit Judge.

Appellant Irene Preobrazhenskaya appeals the grant of summary judgment for defendant Mercy Hall Infirmary on her claim of retaliatory discharge in violation of the Fair Labor Standards Act and the dismissal of her claims for breach of contract, detrimental reliance, and a "public policy based course of action." Our review is plenary.

I.

As the parties are familiar with the facts, we refer only briefly to those necessary to our discussion.

Preobrazhenskaya was hired in May 1992 to work as a licensed practical nurse ("LPN") in Mercy Hall, the infirmary ward of the convent of the Sisters of Mercy where nuns, family members, and others receive residential medical care, despite the fact that she did not have an official certification or LPN license. When she became a permanent employee, she was to work five eight-hour days, for a total of 40 hours per week. Because Mercy Hall patients require care around the clock, employees work varying shifts and are permitted to trade shifts with one another. Overtime rate of pay is time and a half of the ordinary base rate for that employee.

In 1998, Preobrazhenskaya traded shifts with one of her co-workers. Preobrazhenskaya worked eight-hour shifts on April 17, 1998 and May 12, 1998. In exchange, her co-worker worked shifts on April 29 and 30, 1998, for which Preobrazhenskaya was originally scheduled. These shift changes were approved by her supervisor, Margaret Schlicht-Creehan. Due to the shift changes, Preobrazhenskaya worked double shifts on April 17 and May 12 and her hours exceeded the standard 40 hour per week schedule. She sought compensation at the overtime rate of time and a half for the extra eight hours in each of

the two pay periods. Mercy Hall refused to pay the overtime rate and there was considerable correspondence in this connection.

Schlicht-Creehan wrote to Preobrazhenskaya that Preobrazhenskaya's husband (her counsel in this case) telephoned on the evening of March 4, 1999 and used abusive language toward the staff person who handled the telephone call. Schlicht-Creehan wrote that although Preobrazhenskaya could not have anticipated that her husband would make that type of statement on the phone, she should be aware that if it happened again, she "will be held accountable to the Sisters of Mercy" and would be discharged. Supp. App. at 78. The ensuing correspondence between Schlicht-Creehan and Preobrazhenskaya grew more and more antagonistic, with Preobrazhenskaya's characterizing Schlicht-Creehan's allegation as "yet another retaliatory act, in a series of which had been engaged in the past" which was intended to inflict emotional distress on Preobrazhenskaya. Supp. App. at 79.

During the exchange of letters regarding Preobrazhenskaya's husband and the March 4, 1999 telephone incident, Preobrazhenskaya filed a complaint on March 23, 1999 with the Wage and Hour Division of the U.S. Department of Labor in Pittsburgh, Pennsylvania, claiming that she had not been paid at the overtime rate for the hours she worked on April 17, 1998 and May 12, 1998 in excess of her 40 hour per week schedule. The next day, Donna Belloma of the Wage and Hour Division advised William Milburn, a volunteer consultant working as the Advisor on Financial and Legal Affairs for the Sisters of Mercy, that Preobrazhenskaya was entitled to $81.12 in overtime pay. Milbum then advised Sister DeLillis Laboon, Schlicht-Creehan's supervisor, of Belloma's view about Preobrazhenskaya's entitlement to overtime pay, and he suggested that Sister Laboon make it clear to Preobrazhenskaya that switching shifts without authorization would be cause for dismissal. Within a few

days, Belloma advised Preobrazhenskaya that the Sisters of Mercy would be paying the overtime. Mercy Hall then instituted a policy stating that the Sisters of Mercy are not responsible to pay any overtime that may be incurred as a result of trading shifts.

Preobrazhenskaya was later paid $81.12 for the overtime hours. However, she alleges that Schlicht-Creehan reduced her schedule in the following pay period to four days per week, instead of the standard five days, so that the Sisters of Mercy would "get back" the money paid to Preobrazhenskaya. Preobrazhenskaya also complained about not being paid for the Good Friday holiday. She was notified by Brother Charles Mrozinski that she should discuss all scheduling concerns with her supervisor, Schlicht-Creehan. Nonetheless, Preobrazhenskaya wrote again to Brother Charles about her schedule and overtime.

On July 27, 1999, Sister Susan Welsh, Vice President and Treasurer of the Regional Community of Pittsburgh, Sisters of Mercy of the Americas, discharged Preobrazhenskaya by letter stating, inter alia, that their working relationship was no longer "compatible."

Preobrazhenskaya filed a complaint on July 10, 2001, alleging that the Sisters of Mercy violated the Fair Labor Standards Act ("FLSA") by denying overtime pay, readjusting personal and vacation days, and terminating her employment. At her deposition, Preobrazhenskaya stated that she believed she was terminated in retaliation for reporting her employer to the Department of Labor Wage and Hour Division.

Preobrazhenskaya amended her complaint with leave of court to in dude three additional claims alleging breach of contract, detrimental reliance, and violation of public policy. Mercy Hall moved to dismiss Preobrazhenskaya's state law claims and for summary judgment of her claims under the FLSA. The District Court

granted Mercy Hall's motions, adopting the Report and Recommendation of the Magistrate Judge.

Preobrazhenskaya filed a timely appeal. This court has jurisdiction under 28 U.S.C. §1291.

II.

We review a grant of summary judgment de novo. Simpson v. Kay Jewelers, 142 F.3d 639, 643 (3d Cir. 1998). We must examine all of the evidence in the light most favorable to the nonmoving party to determine if there is a genuine issue of material fact. Orsatti v. New Jersey State Police, 71 F.3d 480, 482 (3d Cir. 1995). In determining whether a dispute is genuine, the court's function is to decide "whether the evidence of record is such that a reasonable jury could return a verdict for the nonmoving party." Id.

In order to establish a prima facie case of discriminatory retaliation, a plaintiff must show that (1) the plaintiff engaged in protected activity, (2) the employer took an adverse employment action against her, and (3) there was a causal link between the plaintiff's protected action and the employer's adverse action. Kachmar v. Sungard Data Sys., Inc., 109 F.3d 173, 177 (3d Cir. 1997) (discussing elements of discriminatory retaliation in context of Title VII claim).

The Magistrate Judge concluded that Preobrazhenskaya failed to establish a prima facie case because she did not show the causal link between her protected activity (contacting the Department of Labor's Wage and Hour Division) and her employer's adverse action (firing her). Sister Welsh provided a verification stating that she was solely responsible for the decision to terminate Preobrazhenskaya and that at that time she was unaware that Preobrazhenskaya had contacted the Department of Labor. In Jones v. School District of Philadelphia, 198 F.3d 403,415 (3d Cir. 1999), we affirmed a

grant of summary judgment on a retaliation claim under Title VII where there was no evidence that the principals who made the decision to fire the plaintiff were aware of the protected action. Applied to the facts here, the Magistrate Judge stated that "the mere fact that [Milburn or Sister Laboon] may have reported to Sister Susan [Welsh] and were privy to certain information does not necessarily mean that they divulged that information to Sister Susan or had any input into the decision to terminate [Preobrazhenskaya]." App. at 33.

Arguably, there was some "temporal proximity" between Preobrazhenskaya's call to the Department of Labor and her dismissal four months later. However, the proximity was not "'sufficient to raise the inference that her protected activity was the likely reason for the adverse action, '"Kachmar, 109 F.3d at 177 (quoting Zanders v. National R.R. Passenger Corp., 898 F.2d 1127, 1135 (6th Cir. 1990)), particularly because in this case there is ample evidence of the deterioration of the relationship between the parties arising from causes other than Preobrazhenskaya's complaint to the Department of Labor.

It is significant for our review that the record does not reveal any direct evidence establishing that Sister Welsh knew that Preobrazhenskaya had contacted the Department of Labor. Moreover, the "pattern of antagonism" that grew does not implicate Sister Welsh, who was the person who actually made the decision to fire Preobrazhenskaya. See Kachmar, 109 F.3d at 177 ("where there is a lack of temporal proximity, circumstantial evidence of a 'pattern of antagonism' following the protected conduct can also give rise to the inference"). Thus, the District Court did not err in holding that Preobrazhenskaya failed to meet the required third prong for establishing a prima facie case of retaliation - establishing a causal link between her protected conduct and her termination.

III.

Preobrazhenskaya appeals the dismissal of her claims for relief under theories of breach of contract, detrimental reliance, and violation of public policy. Our review is plenary.

There is a strong presumption of employment at will under Pennsylvania law for all employer-employee relationships. Murray v. Commercial Union Ins. Co., 782 F.2d 432, 435 (3d Cir. 1986). The employee or the employer can end the employment relationship at any time for any reason. Id. This presumption of at-will employment can be overcome by showing that there is an express contract between the parties, with a provision stating that an employee can only be terminated "for cause." Scott v. Extracorporeal, Inc., 545 A.2d 334, 336-37 (Pa. Super. 1988). An "implied-in-fact" contract can also suffice, if additional consideration passes from the employee to the employer "from which the court can infer the parties intended to overcome the at-will presumption." Raines v. Haveford College, 849 F. Supp. 1009, 1012 (E.D Pa. 1994).

However, the plaintiff has the burden to present facts to overcome the at-will presumption. Murray, 782 F.2d at 435.

Preobrazhenskaya did not present facts to overcome the presumption of at-will employment. She had no express contract, and the oral promise she received from her employer that she could remain working for "as long as her performance was satisfactory" is considered too vague to create employment for a term. See, e.g id.

(holding that assurances to employ plaintiff "[a]s long as I wanted and they wanted me and I was satisfactory to them" could not, as a matter of law, overcome presumption of at-will employment). Preobrazhenskaya's argument that the provisions contained in the employee manual (stating that "permanent" employment begins after a 90-day

probationary period and providing a list of reasons in the Rules of Conduct why an employee may be dismissed from employment) constitute a written contract with her employer also fails under Pennsylvania law. As the Magistrate Judge noted, "in order for an employee handbook to constitute a contract, it must contain a clear indication that the employer intends to overcome the at-will presumption." App. at 20 (quoting Ruzicki v. Catholic Cemeteries Ass'n of Diocese of Pittsburgh, 610 A.2d 495,497 (Pa. Super. 1992)). In the employee handbook, the Rules of Conduct section contains a statement that the rules are intended to maintain "a pleasant, orderly, and safe place to work." App. at 5. We have no basis to overturn the Magistrate Judge's finding that the employee manual serves an informational, rather than a contractual, purpose.

Preobrazhenskaya argues that she provided sufficient additional consideration to imply an employment contract when she left her previous employment to take the position with the Sisters of Mercy. Leaving one job to take another one has been held to be "simply a reasoned choice of a new career goal" rather than additional consideration implying an employment contract. Darlinaton v. General Electric, 504 A.2d 306, 315 (Pa. Super. 1986), overruled on other grounds, Clay v. Advanced Computer App. Inc., 559 A.2d 917 (Pa. 1989).

Because no implied contract can be found from the facts of the case, the District Court also properly dismissed the claim for detrimental reliance. Pennsylvania does not recognize a cause of action for detrimental reliance in the context of an at-will employment relationship. Brachyogel v. Beverly Enterprises. Inc., 173 F. Supp. 2d 329, 333 (E.D Pa. 2001) (citing Woomer v. Landis & Gyr. Inc., 1997 WL 256940, at *2 (E.D Pa. May 14, 1997)).

As to Preobrazhenskaya's remaining claim, we have held that Pennsylvania law does not recognize a common law cause of action for violating public policy when there

is a statutory remedy. See Bruffeff v. Warner Communications. Inc., 692 F.2d 910, 918-19 (3d Cir. 1982); Wolk v. Saks Fifih Ave., Inc., 728 F.2d 221,224 n.3 (3d Cir. 1984) ("The availability of a [statutory) remedy precludes other common law remedies even where the statute is not invoked."). The Magistrate Judge pointed out that Preobrazhenskaya's claim of violation of public policy stems from the same set of facts as the claim under the FLSA; in fact, it is the same claim brought under different theories of recovery. Whether or not Preobrazhenskaya's FLSA claim can succeed is irrelevant; "[i]t is the existence of the remedy, not the success of the statutory claim, which determines preemption." DeMuro v. Philadelphia Housing Authority, 1998 WL 962103, at *5 (E.D Pa. 1998) (quoting Jacques v. AKZO Int'l Salt, Inc., 619 A.2d 748, 753 (Pa. Super. 1993)). The District Court thus did not err in dismissing the public policy claim on the basis of applicable law, where a statutory remedy under the FLSA was available.

Finally, Preobrazhenskaya complains of the District Court's decision denying discovery on the new counts of the amended complaint. The decision to expand or limit discovery is within the discretionary power of the district court, and the standard of review for this court is to determine whether the district court abused its discretion. In re Orthopedic Bone Screw Product Liability Litig., 264 F.3d 344, 365 (3d Cir. 2001).

The District Court denied Preobrazhenskaya's motion for additional time for discovery on the claims added in the amended complaint while it considered the defendant's motion to dismiss the claims. Considering that five months of discovery had already taken place, and that the additional claims were based on the same set of facts alleged in the original complaint, the District Court acted within its discretion in denying Preobrazhenskaya's motion for additional time for discovery.

Similarly, the District Court had discretion to permit defendant to take Preobrazhenskaya's deposition a second

time. We see no evidence in the record that the District Court acted unreasonably in granting the Sisters of Mercy's motion to depose Preobrazhenskaya a second time.

V.

For the reasons stated above, we will affirm the District Court's grant of summary judgment on the claim of retaliatory discharge under the FLSA, and affirm the dismissal of the claims for breach of contract, detrimental reliance, and violation of public policy.

/s/ Dolores K. Sloviter
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IRENE PREOBRAZHENSKAYA, Plaintiff,	)	
vs.	)	Civil Action No. 01-1258
MERCY HALL INFIRMARY, aka SISTERS OF MERCY, Defendant.	)	

ORDER

AND NOW, this day of June, 2002, after the plaintiff, Irene Preobrazhenskaya, filed an action in the above-captioned case, and after a motion to dismiss and a motion for summary judgment were submitted by defendant, and after a Report and Recommendation was filed by the United States Magistrate Judge granting the parties ten days after being served with a copy to file written objections thereto, and upon consideration of the objections filed by plaintiff, and upon independent review of the motions and the record, and upon consideration of the Magistrate Judge's Report and Recommendation, which is adopted as the opinion of this Court,

IT IS ORDERED that the motion to dismiss Counts II, III and IV of the amended complaint submitted on behalf of defendant (Docket No 21) and defendant's motion for summary judgment (Docket No.24), which pertains to Count I of the complaint, are granted.

/s/ Robert J. Cindrich
Robert J. Cindrich
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IRENE PREOBRAZHENSKAYA, Plaintiff,	)	
vs	)	Civil Action No. 01-1258
MERCY HALL INFIRMARY, a/k/a SISTERS OF MERCY, Defendant.	)	

REPORT AND RECOMMENDATION

I. Recommendation

It is respectfully recommended that the motion to dismiss Counts II, III and IV of the amended complaint submitted on behalf of defendant (Docket No. 21) and defendant's motion for summary judgment (Docket No. 24), which pertains to Count I of the complaint, be granted.

II. Report

Presently before this Court for disposition is a motion to dismiss Counts II, III, and IV of the amended complaint and a motion for summary judgment regarding Count I of the complaint, brought by the defendant, Mercy Hall Infirmary, a/k/a Sisters of Mercy ("Mercy").

Plaintiff, Irene Preobrazhenskaya, commenced this action under the Fair Labor Standards Act of 1938 ("FLSA"), 29 U.S.C. § 201, et seq., alleging that defendant refused to compensate her overtime pay to which she is entitled and retaliated against her when she complained.

According to the complaint, plaintiff was employed by Mercy from 1992 until July 30, 1999, as a full time practical nurse at the Nursing Station.' During that time

plaintiff was subject to the terms and conditions of employment as set forth in the Employee Handbook which provided for overtime pay when an employee worked more than eight hours a day or more than forty hours in a five-day period.[2] Plaintiff alleges that while she was assigned to the Nurse's Station her supervisor, Ms. Margaret Schlicht-Creehan ("Schlicht-Creehan") asked plaintiff to accept overtime assignments but that defendant refused to compensate her for the extra hours at the overtime rate.[3] Moreover, plaintiff claims that Schlicht-Creehan retaliated against her by recalculating her personal and vacation days which resulted in a loss of three personal days.[4]

In accordance with defendant's grievance procedure, plaintiff complained to Charles Mrozinski ("Mrozinski"), who responded to plaintiff in a letter dated November 10, 1998, informing her that the three personal days had been credited back to her.[5] Mrozinski,

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1 Complaint ¶¶ 6, 7 (Docket No.1).

2 Complaint ¶ 8. It appears that the overtime rate was one and one-half times the base rate of the employees's hourly rate. Id.

3 Complaint¶¶9, 10, 11, 22.

4 Complaint ¶ 12. Plaintiff also alleges that defendant began implementing a "Waiver of Overtime" form in September of 1998 whereby "employees had to waive their right to overtime pay result[ing] from excessive hours" and that the waiver has nullified the overtime standards imposed by the Act. Complaint ¶¶ 20, 21. The waiver form, which plaintiff has attached to the complaint as Exhibit B, however, appears only to apply in situations where employees have traded shifts which results in one of the employees working overtime. See Complaint, Exhibit B.

5 Complaint¶¶ 13-15.

however, also informed plaintiff that she would not receive the requested overtime pay and that those decisions were left up to Schlicht-Creehan.[6]

Plaintiff then complained to the Director of Human Resources, Ms de Lellis Laboon ("Laboon"), thereby exhausting Mercy's grievance procedures, informing her that Schlicht-Creehan continued to retaliate against her by refusing her vacation requests and threatening "to get rid of plaintiff for good."[7] Laboon apparently responded to plaintiff in letters dated December 7, 1998 and December 17, 1998, wherein she stated that Schlicht-Creehan's decision regarding plaintiff's January vacation was hers to make as the head of Mercy's employees, and denied plaintiff the requested overtime.[8]

Plaintiff, it appears, then contacted the Pittsburgh Office of the United States Department of Labor, Wage and Hour Division ("DOL") on March23, 1999, which informed plaintiff the next day that defendant would pay plaintiff any overtime pay due under the Act.[9] As a result, plaintiff complains that Schlicht-Creehan threatened her with disciplinary action and, if she continued to complain, termination.[10] As well, Schlicht-Creehan apparently reduced plaintiff's work week in order to offset the overtime pay due to plaintiff and plaintiff was thereafter denied the

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6 Complaint ¶¶ 16, 22

7 Complaint ¶¶ 17, 18, 23

8 Complaint ¶ 19, 22 Although plaintiff has attached the December 7, 1998 letter relating to an apparent vacation request to her complaint as Exhibit A, the December 17, 1998 letter which presumably discusses overtime pay has not been submitted.

9 Complaint ¶¶ 24, 25.

10 Complaint ¶ 26.

"holiday payments" that she had been promised when she was hired and had, in fact, received each year until she complained to the federal govemment.[11] It appears that plaintiff's subsequent complaints to LaBoon were ignored and that after complaining toMrozinski on May 30, 1999, she was terminated.[12]

Plaintiff filed the instant complaint on July 10, 2001, bringing a single claim under the FLSA (Count 1). Plaintiff alleges that defendant intended to cause her injury; that its conduct was willful and in conscious disregard for her rights under the FLSA; that she has been unable to obtain other employment since she was discharged by defendant thereby compelling her to return to school in order to pursue a new profession; and that she has incurred $12,000.00 in expenses as a result.[13] As well, plaintiff complains that as a result of defendant's alleged unlawful conduct she has suffered other unspecified losses and damages, anxiety, worry, mental and emotional distress, and other incidental and out of pocket expenses. [14] In addition to being reinstated to her position as a full time practical nurse, plaintiff seeks back wages, compensatory damages, punitive damages and attorney's fees.

An amended complaint was filed on January 14. 2002. in which plaintiff has brought three additional claims for breach of contract (Count II). detrimental reliance (Count III). and a "public policy based cause of action" (Count IV).

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11 Complaint ¶¶ 27, 28, 30.

12 Complaint ¶¶ 29, 31, 32. Plaintiff has attached a copy of the termination letter to the complaint as Exhibit C.

13 Complaint ¶¶ 31-33, 40.

14 Complaint ¶¶ 37, 38.

In support thereof, plaintiff alleges that she interviewed with defendant for a position on May 13, 1992, at which time Sr. Mary Dennis ("Dennis"), the Director of Human Resources, told plaintiff that she was in charge of hiring new employees; that she was authorized to hire someone who would be employed as an LPN; that even though plaintiff was not licensed in the Commonwealth of Pennsylvania that Mercy did not require a license; that her decision to hire plaintiff was based on plaintiff's educational background and professional skills; that Mercy treated its employees fairly; that Mercy would pay wages substantially higher than plaintiff was then receiving; that Mercy had an excellent retirement plan; that plaintiff would be employed for as long as she liked unless she violated the employee rules of conduct which included a specific list of violations for which an employee could be discharged; that it was not Mercy's policy or custom to terminate employees except for those reasons listed; and that Mercy provides a fair periodic performance evaluation of every employee.[15] During the interview Dennis apparently also told plaintiff that Mercy planned to employ her for forty (40) hours a week and would make her full time as soon as such a position became available and assisted plaintiff in filling out the employment application.[16]

On May 15, 1992, Dennis then called plaintiff to offer her the position that had been discussed at the interview and informed plaintiff that she would be subject to a ninety (90) day probationary period following which she would immediately be covered by Mercy's group medical insurance; that she would receive ten (10) days paid vacation, ten (10)paid holidays, and six (6) sick days annually; and that she should

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15 Amended Complaint ¶¶ 41, 42, 47 (Docket No.15).

16 Amended Complaint ¶¶ 43, 44.

leave her current position because Mercy wanted plaintiff to begin work on May 21, 1992.[17]

Plaintiff further alleges that based on Dennis's representations she accepted the position and performed all of the duties assigned to her successfully and satisfactorily until she was terminated in July of 1999.[18] During her employment, plaintiff alleges that no employee was terminated without cause and those who were terminated were discharged for misconduct cited in the employees' rules of conduct.[19] Nevertheless, according to plaintiff, she was terminated on July 27, 1999, by Susan Welsh, Mercy's Vice President and Treasurer, without a reasonable explanation and without reference to the reasons for termination cited in the employee's rules of conduct.[20]

Defendant has now filed a motion to dismiss seeking to have Counts II, III, and IV dismissed for failure to state a claim upon which relief may be granted and a motion for summary judgment with respect to Count I arguing that plaintiff is unable to establish that her termination was in retaliation for filing a complaint with the DOL or that the nondiscriminatory reasons given for her discharge are not the true reasons. Defendant alternatively contends that the FLSA does not apply to plaintiff's claim and that it's activities nevertheless fall under the FLSA's Domestic Service Exemption.

Motion to Dismiss

In reviewing a motion to dismiss under Rule 12(b)(6), all well pleaded allegations of the complaint must be accepted as true

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17 Amended Complaint ¶¶ 45, 46

18 Amended Complaint ¶¶ 48, 49, 54.

19 Amended Complaint ¶¶ 50, 51.

20 Amended Complaint ¶ 52.

and viewed in a light most favorable to the non-movant. Brader v. Allegheny General Hospital, 64 F.3d 869, 873 (3d Cir. 1995); Scrob v. Patterson, 948 F.2d 1402, 1405 (3d Cir. 1991). The Court is not, however, required to accept as true unsupported conclusions and unwarranted inferences. Schuylkill Energy Resources v. PP&L, 113 F.3d 405, 417 (3d Cir. 1997). Thus, "if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," the motion to dismiss is properly granted. Haines v. Kerner, 404 U.S. 519, 520-21 (1972), quoting Conley v.Gibson, 355 U.S. 41, 45-46 (1957). The issue is not whether the plaintiff will prevail in the end but only whether he should be entitled to offer evidence in support of his claim. Scheuer v.Rhodes, 416 U.S. 232, 236 (1974).

Defendant first argues that plaintiff's breach of contract claim is subject to dismissal as plaintiff has failed to overcome the presumption under Pennsylvania law that her with Mercy was at-will.

Indeed, it appears undisputed that under Pennsylvania law all employment is presumed to be at-will and that, absent a statutory or contractual provision to the contrary, either the employee or the employer may end the relationship at any time for any reason. Murray v.Commercial Union Ins. Co., 782 F.2d 432, 435 (3d Cir. 1986); Raines v. Haverford College, 849 F. Supp. 1009, 1011-12 (E.D Pa. 1994), citing Ruzicki v. Catholic Cemeteries Association, 610 A.2d 495, 497 (Pa. Super. 1992). See Shick v. Shirey, 716 A.2d 1231, 1233 (Pa. 1998) ("Generally, an employer may discharge an employee with or without cause, at pleasure, unless restrained by some contract.")(internal quotations omitted). The presumption of at-will employment, however, may be overcome where, inter alia the terms of a contract, whether express or implied in fact, change the presumed at-will employment into one that is for a specific term, or that can only be terminated for objective "just cause" offenses, or both. Scott v.Extracorporeal, Inc., 545 A.2d 334, 337 (Pa. Super. 1988). See Raines v. Haverford College, 849

F. Supp. at 1012 (The at-will presumption will be overcome where there is "either an express contract between the parties, or an implied in-fact contract plus additional consideration passing from the employee to the employer from which the court can infer the parties intended to overcome the at-will presumption."). Moreover, it is the plaintiff's burden to overcome the presumption. Murray v. Commercial Union Ins. Co., 782 F.2d at 435.

Here, plaintiff suggests that a contract of employment sufficient to overcome the at-will presumption existed between the parties as evidenced by the oral representation made to her during her interview that she would be employed as an LPN as long as she performed satisfactorily and the provision in the Employee Handbook stating that satisfactory completion of the ninety (90) day probationary period would result in "permanent" status. Plaintiff also points to the provisions of the Employee Handbook which sets forth specific reasons for which an employee may be terminated and argues that this evidences an intent not to terminate an employee without just cause.[21]

It is well settled in Pennsylvania that an employer's representation to an employee that he or she would not be terminated as long as his or her work was performed

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21 See Amended Complaint ¶¶ 59(a) & (c). Plaintiff also appears to have based her breach of contract claim on an implied obligation to deal with plaintiff fairly and in good faith. See Amended Complaint ¶ 50(d). Because plaintiff has failed to respond to defendant's argument that there is no common law duty to deal fairly and in good faith in the at-will employment context, she appears to have conceded the issue and, thus, it as not been addressed here.

satisfactorily or a promise of "permanent" employment is insufficient to create an enforceable obligation on the part of an employer. See Murray v. Commercial Union Ins. Co., 782 F.2d at 435 (Finding that employer's assurances that plaintiff would be employed as long as he was satisfactory to employer or promises of permanent employment are too vague to create an employment term); Scott v. Extracorporeal, Inc., 545 A.2d 334, 337 (Pa. Super. 1988)(Finding that an oral promise that employment would be permanent was insufficient to rebut at-will presumption); Ross v.Montour Railroad Co., 516 A.2d 29, 32 (Pa. Super. 1 986)(An expectation of "life long" employment alone is not sufficient to overcome the at-will rule); Murphy v. Publicker Industries,Inc., 5 16 A.2d 47, 51-52 (Pa. Super. I 986)(Finding that a promise of life-time employment is not in itself definite enough to overcome the at-will presumption); Veno v. Meredith, 515 A.2d 571, 579 (Pa. Super. 1986), allocatur denied, 616 A.2d 986 (Pa. I 992)(An employer's statements to employee, including "I want to retire together," held too broad and vague to overcome the at-will presumption); Betts v. Stroehmann Bros., 512 A.2d 1280, 1281 (Pa. Super. 1986)("An intention to offer a specific tenure of employment is not inferable from an employer's statement, verbal or written, that employees would not be terminated so long as they performed their work in a satisfactory manner"). See also Rogers v. International Business Machines Corp., 500 F. Supp. 867, 869 (W.D. Pa. 1980); Moorhouse v. Boeing Company, 501 F. Supp. 390, 395-96 (E.D. Pa.), affirmed, 639 F.2d 774 (3d Cir. 1980).

It therefore appears that defendant's representations made during plaintiff's interview that she would remain employed as long as she performed satisfactorily and the provision in the Employee Handbook regarding elevation to "permanent" status upon completion of the probationary period do not create contractual terms by which defendant is bound. Thus, the only remaining question is whether the provisions of the Employee Handbook setting forth reasons for which an

employee could be terminated created an implied contract. Under Pennsylvania law,

> [i]n order for an employee handbook to constitute a contract, it must contain a clear indication that the employer intends to overcome the at-will presumption. *Ruzicki [v. Catholic Cemeteries, Inc.]*, 416 Pa. Super. 37, 610 A.2d 495, 497 [(1992)].
> Further, under the reasonable person standard, a handbook is only enforceable as a contract if a reasonable person in the same position as the employee would interpret its provisions as evidencing an intent by the employer to overcome the at-will presumption. *Id.*

Raines v. Haverford College, 849 F. Supp. at 1012. See Martin v. Capital Cities Media, Inc., 511 A.2d 830, 837 (Pa. Super. 1 986)(Any language short of a definitive statement that the at-will presumption is being replaced will be strictly reviewed.) Moreover, whether or not the handbook contains evidence demonstrating the employer's intent to be legally bound is a question of law for the court to decide. Id.

In the instant case, plaintiff relies upon the provisions of the Employee Handbook entitled "Employee Rules of Conduct" and "Termination of Employment" as evidencing Mercy's intent to overcome the at-will presumption. In the former, defendant has set forth a list of behavioral infractions that "may" result in disciplinary measures -- either two written warnings followed by discharge or automatic discharge. The Termination of Employment provision appears two clauses later and provides that:

> If an employee decides to leave the employ of the Sisters of Mercy voluntarily, the supervisor must be notified in writing at least two weeks in advance.

> If an employee terminates employment voluntarily and gives a minimum notice with a promise to continue work for two weeks, payment will be made for any unused vacation time which has been earned.
>
> An employee whose standard conduct does not meet with the approval of the Sisters of Mercy may be subject to dismissal. In such case, the employee is not entitled to notice or termination pay.
>
> Upon termination the employee must have an exit interview with the personnel director. At this time the employee must return the other items that were necessary in the job. No paychecks will be given until all items have been returned.

Employee Handbook, pp. 7-8.[22]

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22 A copy of the Employee Handbook has been attached to plaintiff's brief as Exhibit C (Docket No.28). Normally in reviewing a motion to dismiss the court may consider only the allegations set forth in the complaint, any exhibits submitted with the complaint and matters of public record. Pension Benefit Guaranty Corp. v. White Consolidated Industries, Inc., 998 F.2d 1192, 1196 (3d Cir. 1993), cert. denied, 510 U.S. 1042 (1994). Where matters outside the pleadings are considered the motion is properly converted to one for summary judgment unless the plaintiff's claims are based on the document. Id. See See Beverly Enterprises Inc. v. Trump, 182 F.3d 183 (3d Cir. 1999), cert. denied, 528 U.S. 1978 (2000). Because plaintiff's complaint and amended complaint refer to the Employee Handbook, it is properly considered by the Court without converting the instant motion to one for summary judgment. Id.

Although plaintiff argues that the third paragraph of the termination provision coupled with the Rules of Conduct provision manifests Mercy's intent not to discharge employees without just cause, we disagree.

First, there is clearly no express provision in the handbook that an employee can only be terminated for just cause. Second, the Rules of Conduct provision is prefaced with a statement regarding the need for rules so as to maintain "a pleasant, orderly and safe place to work" and not to create an employment contract. Moreover, it also states that the conduct listed "may" result in disciplinary action and does not state, contrary to plaintiff's assertion, that it is an exclusive list of actionable conduct. Indeed, looking at the handbook as a whole, the termination provision is separate from the rules provision thereby suggesting that conduct other than that listed may result in dismissal if it does not meet with the Sisters' approval. It therefore appears that the listed infractions, which are common sense enumerations of actions generally understood to call for disciplinary action and of the type found in most employee handbooks,[23] are merely guidelines and serve an informational purpose only. See Scott v. Extracorporeal Inc., 545 A.2d at 337-38; Martin v. Capital Cities Media Inc., 511 A.2d at 838.

Finally, the handbook submitted by plaintiff states that it "supersedes all previous handbooks" which suggests that the handbook is periodically revised and its provisions unilaterally subject to change by Mercy. Id. Under these circumstances, there is no indication

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23 For instance, an employee may receive warnings prior to dismissal for misusing the telephone, removing property, smoking in nondesignated areas, tardiness, sleeping on the job, threatening other employees, and taking drugs. Automatic termination may result for falsifying records, a breaching of medical ethics, carrying a firearm or immoral conduct. Employee Handbook, pp.5-6.

that Mercy intended to surrender the at-will presumption nor does it appear that plaintiff could reasonably expect that Mercy intended to bind itself to the Employee Handbook provisions. As such, plaintiff has failed to plead sufficient facts to rebut the presumption that she was an at-will employee and her breach of contract claim is properly dismissed.[24]

Plaintiff has also brought a claim for detrimental reliance in her amended complaint which defendant argues should be dismissed because as an at-will employee plaintiff could be terminated for any reason regardless of any promises defendant may have made to her and upon which she may have relied.

Although generally Pennsylvania Courts do not recognize a cause of action for detrimental reliance or estoppel as an exception to the at-will presumption, the at-will

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We note here that defendant has submitted a later version of the handbook, which was purportedly revised and distributed to plaintiff in April of 1993. It seemingly contains a disclaimer, stating that it does not constitute a contract and that Mercy reserves the right to terminate an employee at any time with or without cause, which has been held sufficient, standing alone, to retain the at-will presumption. Raines v. Haverford College, 849 F. Supp. at 1012, citing Ruzicki v. Catholic Cemeteries Inc., 610 A.2d at 496; Rutherfoord v. Presbyterian-University Hospital, 612 A.2d 500, 504 (Pa. Super. 1992). Plaintiff, however, has challenged the authenticity of the 1993 handbook, notwithstanding it is virtually identical to the one she has submitted, and particularly the disclaimer clause. Nevertheless, having found that the handbook as submitted by plaintiff, which does not contain the disclaimer, does not create a legal obligation on defendant's part, we need not address the validity of the disclaimer or the handbook submitted by defendant. It should also be pointed out that while plaintiff makes

presumption may be rebutted by a showing that an employee has furnished his or her employer additional consideration. Cashdollar v. Mercy Hospital, 595 A.2d 70, 72 (Pa. Super. 1991). Cf. Stump v. Stroudsburg Municipal Auth, 658 A.2d 333, 335-36 (Pa. 1995); Anderson v.Haverford College, 851 F. Supp. 179, 183 (E.D Pa. 1994), citing Paul v. Lankenau Hospital, 569 A.2d 346, 348 (Pa. 1990). Additional consideration will be found where "an employee affords his employer a substantial benefit other than the services which the employee is hired to perform, or when the employee undergoes a substantial hardship other than the services which he is hired to perform." Scott v. Extracorporeal Inc., 545 A.2d at 339. See Donahue v. Federal Express Corp., 753 A.2d 238 (Pa. Super. 2000).

Further, although the question of whether additional consideration has been given is normally one for the jury to decide, "the court may answer questions of fact... when the evidence is so clear that no reasonable man would determine the issue before the court in any way but one ...." Martin v. Safeguard Scientifics, Inc., 17 F.Supp.2d 357, 369 (E.D Pa. 1998), quoting Darlington v. General Electric, 504 A.2d 306, 312 (Pa. Super. 1986), overruled on othergrounds, Clay v. Advanced Computer Applications, Inc., 559 A.2d 917 (Pa. 1989). Courts have narrowly interpreted additional consideration requiring "extraordinary detriment or... an extraordinary benefit beyond the normal services for which he was hired" before permitting the jury to decide the issue. Id., quoting Darlington v. General Electric, 504 A.2d at 315.

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24 (...continued)
much of the fact that she was never told that her employment was at-will, it is not the employer's responsibility to do so. Rather, as already discussed at-will employment is presumed and it is plaintiff's burden to prove otherwise. Murray v. Commercial Union Ins. Co., 782 F.2d at 435

Here, plaintiff does not contend that she bestowed a substantial benefit on Mercy and the only hardship that can be gleaned from her complaint is that she quit her former job in order to take the position with Mercy. It is has been repeatedly held, however, that merely leaving one job in order to take another is not sufficient detriment to constitute additional consideration but rather Is "simply a reasoned choice of a new career opportunity." Darlington v. General Electric, *504* A.2d at 315. See Martin v. Safeguard Scientifics, Inc., 17 F.Supp.2d at 370 ("Simply foregoing one employment opportunity in favor of another is not, in itself, a sufficient hardship."); Veno v. Meredith, 515 A.2d at 579-80 (Finding that foregoing other career opportunities was merely a demonstration of the plaintiff's preference to remain employed with the defendant.)[25]

In this manner, News Printing Co. v. Roundy, 597 A.2d 662 (Pa. Super. 1991)("Roundy"), upon which plaintiff relies, is easily distinguishable from the instant case as Roundy not only quit a job and rejected another offer of employment in order to accept plaintiff's offer but he and his wife sold their house in Massachusetts in order to move to Pennsylvania where they then purchased a new home. Roundy clearly suffered greater hardship than plaintiff who merely left one job to take another. Thus, Roundy does not appear to provide the basis for finding that plaintiff suffered a substantial hardship and plaintiff is therefore unable to show that

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See Amended Complaint ¶¶ 43, 46, 64. Although plaintiff has argued in her brief that she also moved to another apartment in the Pittsburgh area and was urged by defendant to forgo other job opportunities to work for Mercy neither of these allegations appear in her amended complaint and do not serve to defeat a motion to dismiss. Pennsylvania v. PepsiCo Inc., 836 F.2d 173, 181 (3d Cir. 1988)(A complaint may not be amended by the brief in opposition (continued...)

she provided Mercy with additional consideration. As such, her claim for detrimental reliance is properly dismissed.

Finally, defendant asks that plaintiff's public policy claim be dismissed as it does not fall under the few public policy exceptions recognized in Pennsylvania and that, to the extent that plaintiff has based her claim on the FLSA, it is inapplicable as neither plaintiff nor Mercy were engaged in interstate commerce.

To support its position, plaintiff cites to Lamont v. Frank Soup Bowl Inc., 2001 WL 521815 (S.D.N.Y. 2001) ("Lamont"), wherein the District Court for the Southern District of New York granted the defendant's motion for summary judgment as there was no evidence of record which would support a finding that defendant either engaged in interstate commerce or the production of goods for the interstate commerce Having cited to Lamont, defendant then concludes, without discussion, that because the Sisters of Mercy do not engage in interstate commerce the FLSA is inapplicable.

Notwithstanding that Lamont is not binding on this Court and that the fact pattern is wholly dissimilar, it is clear that the instant case is in a much different posture than was the Lamont case as the motion presently before this Court is one to dismiss rather than one for summary judgment. Thus,

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25 (... continued)
to a motion to dismiss.) Nevertheless. even if these hardships" had been pled in plaintiff's amended complaint. they do not appear to be sufficiently extraordinary to overcome the at-will presumption. Indeed. the fact that plaintiff moved to another apartment was not a sacrifice she had to make in order to accept Mercy's offer of employment but was an independent choice. Moreover, as already discussed, foregoing one employment opportunity in order to accept another is insufficient to establish additional consideration, Martin v. Safeguard Scientifics, Inc., 17 F.Supp.2d at 370.

the question of whether there is *evidence of record* to support a finding that defendant is not engaged in interstate commerce is not before us and, indeed, defendant has not offered any to support its position on the issue. As such, we do not find that either Lamont or defendant's conclusion regarding the interstate commerce issue provide a basis for finding the FLSA inapplicable or for dismissing plaintiff's public policy claim

Defendant also argues, however, that even if the FLSA applies plaintiff's public policy claim should still be dismissed as Pennsylvania does not recognize a common law cause of action for violating public policy where a statutory remedy exists. We agree.

As already discussed, the general rule in Pennsylvania is that all employment is presumed to be at-will and that, absent a statutory or contractual provision to the contrary, either the employee or the employer may end the relationship at any time for any reason. Murray v. Commercial Union Ins. Co., 782 F.2d at 435; Raines v. Haverford College, 849 F. Supp. at 1011-12. An exception to the general rule has evolved, however, where "an employee has been terminated in violation of a 'significant, clearly mandated public policy.'" Hicks v. Arthur, 843 F. Supp. 949, 957 (E.D Pa. 1994), quoting Brown v. St. Luke's Hospital, 816 F. Supp. 342, 344 (E.D. Pa. 1993). Nevertheless,

> [a]n employee has a rather narrowly construed cause of action for wrongful discharge "where some recognized facet of public policy is threatened," *Geary v. US. Steel Corp.*, 456 Pa. 171, 319 A.2d 174, 180 (1974). In addition, a cause of action for wrongful discharge may be maintained when there is no available statutory remedy for an aggrieved employee. *Freeman [v. McKellar]*, 795 F.Supp. [733,] 742 [E.D. Pa. 1992)]. However, if the legislature has enacted laws which precisely protect the interests of employees

> that the plaintiff alleges have been violated, then the plaintiff's cause of action cannot be maintained. *Id.*

Id. See Bruffett v. Warner Communications, Inc., 692 F.2d 910, 919 (3d Cir. 1982)("T]he only Pennsylvania cases applying the public policy exception have done so where no statutory remedies were available."). See also McDaniel v. American Red Cross, 58 F.Supp.2d 628, 630 (W.D. Pa. 1999) ("Discrimination in violation of a federal, state or local statute is an independent legal wrong for which redress may be obtained, but is neither a breach of employment contract nor a common law tort.")

Here, in support of her public policy claim plaintiff has alleged that defendant has violated public policy by failing to compensate plaintiff for hours worked in excess of forty hours in a given week and for terminating her in retaliation for filing a complaint with the DOL.[26] These very claims, however, may be -- and, indeed, have been -- brought by plaintiff under the FLSA. It therefore appears that plaintiff has a statutory remedy available to her and her public policy claim is properly dismissed. Hicks v Arthur, 843 F. Supp. at 957, See Platt v. Burroughs Corp., 424 F.Supp. 1329, 1340 (E.D Pa. 1976)(Finding that the FLSA is "the sole remedy available to the employee for enforcement of whatever rights he may have had under the FLSA.")

In fact, plaintiff does not dispute that she has a statutory remedy to address her claims but argues only that because her claims under the FLSA are the subject of defendant's motion for summary judgment that she will have no recourse if that motion is granted. However, "[i]t is the existence of the remedy, not the success of the statutory claim, which determines preemption." Demuro v. Philadelphia Housing Authority, 1998 WL 962103*5 (E.D Pa. 1998),

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Amended Complaint ¶¶ 69-71.

quoting Jacques v. AKZO Int'l Salt Inc., 619 A.2d 748, 753 (Pa. Super. 1993). Thus, having properly stated a claim under the FLSA in the first instance, it appears that plaintiff's public policy claim is properly dismissed whether she ultimately prevails on her FLSA claim or not. See also Cox v. Radiology Consuh'n~ Associates, Inc., *658* F. Supp 264, 266 (W.D. Pa. 1987), affirmed, 835 F.2d 282 (3d Cir. 1987)(Finding that plaintiff's public policy claim was properly dismissed where a statutory remedy was available notwithstanding the fact that plaintiff had failed to comply with the statute of limitations.)

Motion for Summary Judgment

Summary judgment is appropriate where "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Fed. R.Civ. P 56(c). See Marzano v. Computer Science Corp., 91 F.3d 497, 501 (3d Cir. 1996). In deciding a motion for summary judgment the court must view all inferences in a light most favorable to the non-moving party. Id., citing Armbruster v. Unisys Corp., 32 F.3d 768, 777 (3d Cir. 1994). The non-moving party, however, may not rely on bare assertions, conclusory allegations or mere suspicions to support its claim but must demonstrate by record evidence the meritorious nature of the claim. Orsatti v. New Jersev, 71 F.3d 480, 484 (3d Cir. 1995).

As previously discussed, in its motion for summary judgment defendant initially asks that plaintiff's claim brought under the FLSA be dismissed as plaintiff is unable to establish that her termination was in retaliation for filing a complaint with the DOL.

It appears from plaintiff's deposition testimony that her FLSA claim is based solely on the anti-retaliation provision which provides that it shall be unlawful for any person,

> to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this

subchapter, or has testified or is about to testify in any such proceeding.... 29 U.S.C.A. § 215 (a)(3).[27]

In analyzing claims of retaliation under the FLSA, the three-stage shifting burdens of proof developed for employment discrimination cases appears to apply. Brungart v. BellSouth Telecommunications Inc., 231 F.3d 791, 798 (11th Cir. 2000), cert. denied, 532 U.S. 1037 (2001); Chaffin v. John H. Carter Co., 179 F.3d 316, 319 (5th Cir. 1999); King v. Preferred Technical Group, 166 F.3d 887, 891-92 (7th Cir. 1999); Hodgens v. General Dynamic Corp., 144 F.3d 151, 160 (lst Cir. 1998); Morgan v. Hilti Inc., 108 F.3d 1319, 1323 (10th 1997). See Cononie v. AllegheQy General Hospital, 2002 WL 181357*1 (3d Cir. 2002). See also McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1 973). Plaintiff therefore has the initial burden of demonstrating, by a preponderance of the evidence, a *prima facie* case of retaliatory discharge or retaliation. Id.; Brungart v. BellSouth Telecommunications Inc., 231 F.3d at 798.

Once the plaintiff has established a *prima facie* case, the burden of production shifts to the defendant to articulate a legitimate, non-discriminatory reason for the employment decision. Sempier v. Johnson & Higgins, 45 F.3d 724, 728 (3d Cir.), cert. denied, 515 U.S. 1159 (1995). If the defendant succeeds in articulating such a reason, the burden then shifts back to the plaintiff "who must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its

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27 Indeed, at her deposition plaintiff was specifically asked whether she was asserting a claim for unpaid compensation in this lawsuit to which she replied. "I'm asserting that I was fired because I complained to the Wage and Hour Division. "Plaintiff's Deposition at pp.89-90, attached to Defendant's Brief in Support of Motion for Summary Judgment as Exhibit 1 (Docket No.25). See Complaint¶ 71.

true reasons, but were pretext for discrimination." Marzano v. Computer Science Corp., supra at 502-03, quoting Texas Department of Community Affairs v Burdine, supra at 252-53. At all times, however, the burden of persuasion remains with the plaintiff. Id. at 503.

In order to establish a prima facie case of retaliation a plaintiff must show that 1) the plaintiff engaged in protective activity; 2) the employer took an adverse employment action against her; and 3) there was a causal connection between plaintiff's participation in the protected activity and the employer's adverse action. Kachmar v. Sungard Data Systems, Inc., 109 F.3d 173, 177 (3d Cir. 1997).

Defendant in the instant case does not dispute that plaintiff engaged in protected activity when she complained to the DOL or that it's decision to terminate plaintiff was an adverse employment action against her. Defendant does dispute, however, whether there is sufficient evidence of record from which a fact finder could conclude that plaintiff was fired because she complained to the DOL. Specifically, defendant argues that plaintiff is unable to demonstrate the third prong of the *prima facie* case as Sister Susan Welsh, who was solely responsible for the decision to discharge plaintiff, was unaware at the time that decision was made that plaintiff had made a complaint to the DOL. To support its position defendant has submitted a verification by Sister Susan Welsh[28] in which she avers, inter alia, that she alone was responsible for the decision to terminate plaintiff; that she did so because plaintiff was unwilling to get along with her supervisor and accept the changes that had been made to the Employee Handbook and because of plaintiff's insubordinate attitude and behavior which was not compatible with the environment encouraged by the Sisters in

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28 A copy of the Sister's verification is attached to defendant's brief as Exhibit 13 (Docket No.25).

their home; and that when she made the decision to terminate plaintiff she was unaware that plaintiff had made a complaint to the DOL. Indeed, the Sister states that there was no information regarding plaintiff's complaint to the DOL in her personnel file and that she learned of it for the first time when she read plaintiff's complaint instituting the instant lawsuit.

Because it appears that Sister Susan was unaware that plaintiff had made a complaint to the DOL when she decided to terminate plaintiff's employment it would appear that plaintiff is unable to demonstrate that she was discharged because she complained to the DOL. See Jones v. School District of Philadelphia, 198 F.3d 403, 415 (3d Cir. 1999) (Affirming District Court's finding that the record was devoid of evidence that defendant's actions against plaintiff were in retaliation for filing complaints with the EEOC where there was no evidence that the principals who made the decision to fire plaintiff were aware of those complaints.); Bedford v. SEPTA, 867 F. Supp. 288, 293 (E.D Pa. 1994) ("If the person who decided that plaintiff's employment should be terminated had no knowledge that she had engaged in the protected activity in question, then clearly he could not have retaliated against her for doing so.") As such, it appears that plaintiff is unable to establish a prima facie case of retaliation and defendant is entitled to summary judgment at Count I of the complaint.

Plaintiff nevertheless contends that knowledge of plaintiff's complaint should be imputed to Sister Susan Welsh because William Milburn, Advisor on Financial and Legal Affairs, and Ms. DeLellis,[29] a Director of Human Resources,

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29 In her complaint, plaintiff has referred to a Ms. de Lellis Laboon as also being a Director of Human Resources. Although we assume Ms. Laboon is the same person as Ms. DeLellis we have referred to her here as plaintiff has done in her responsive brief.

were aware that plaintiff had made a complaint to the DOL. Plaintiff argues that because Mr. Milburn and Ms. DeLellis report to Sister Susan that she had the means to know of plaintiff's complaint and therefore should be charged with that knowledge. Plaintiff however, has not only failed to provided any legal support for her position but has not submitted any evidence from which it could be concluded that either Mr. Milbum or Ms DeLellis actually discussed that fact that plaintiff had made a complaint regarding unpaid overtime with her. The mere fact that they may have reported to Sister Susan and were privy to certain information does not necessarily mean that they divulged that information to Sister Susan or had any input into the decision to terminate her. In our view, plaintiff's bald conclusions to the contrary are not sufficient to overcome Sister Susan Welsh's sworn statement or to create a genuine issue of material fact. See Orsatti v. New Jersey, 71 F.3d at 484; Gray v. York Newspapers Inc., 957 F.2d 1070, 1078 (3d Cir. 1992), quoting Anderson v. Liberty Lobby Inc., 477 U.S. 242, 249-50 (1986)("If the evidence is merely colorable, ... or is not significantly probative, ... summary judgment may be granted."); Bazargani. v. Haverford State Hospital, 90 F.Supp.2d 643,654 n.22 (E.D Pa 2000), affirmed 2002 WL 895653 (3d Cir. 2002).

Plaintiff further argues that Sister Susan Welsh had actual knowledge of her complaint to the DOL as evidenced by a memorandum she received from Brother Mrozinski dated November of 1998, in which he discusses the fact that, although not scheduled to work overtime, plaintiff switched shifts with another employee which resulted in her having worked in excess of forty hours in a given week and that despite the verbal agreement among department members that they would not get paid overtime when swapping resulted in double shifts, by law plaintiff would be entitled to overtime pay.[30] As argued by defendant, however,

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30 A copy of Brother Mrozinski's November 1998 (continued...)

Brother Mrozinski's memorandum predates plaintiff's March 23, 1999 complaint to the DOL by four months. Thus, while the memorandum may have placed Sister Susan on notice that a controversy existed where switching shifts resulted in unscheduled overtime, it could not have placed her on notice that plaintiff had complained to the DOL as plaintiff had not yet done so. See Ball v. Memphis Bar-B-Q Co., 228 F.3d 360, 364 (4th Cir. 2000) (Finding that the existence of a "proceeding" is essential to the statutory circumstance and that the retaliation provision does not apply to future anticipated proceedings.)

Finally, plaintiff cites to her July 15, 1999 letter to Brother Mrozinski, in which she challenges the application of a new provision in the Employee Handbook regarding holiday pay since defendant did not previously secure her assent to it. Therein, plaintiff urges Mrozinski to take action before she has "to resort to legal measures or, perhaps, once again, seek outside authority to restore justice."[31] Plaintiff argues that this language evidences the fact that Sister Susan had actual knowledge that she had filed a complaint with the DOL in March of 1999. We disagree.

Even if the threat of "resorting to legal measures" could be equated with complaining to the DOL, as already set forth, the fact that plaintiff may have contemplated action at some point in the future does not implicate the FLSA. See Ball v. Memphis Bar-B-O Co., 228 F.3d at 364. Moreover, the fact that plaintiff may have consulted "outside authority" in the past, even viewed in a light most favorable to plaintiff, is

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30 (... continued)
Memorandum is attached as Exhibit 2 to Plaintiff's Opposition to Motion for Summary Judgment (Docket No.27).

31 A copy of plaintiff's July 15, 1999 Letter is attached as Exhibit 4 to Plaintiff's Opposition to Motion for Summary Judgment (Docket No.27).

sufficiently vague that, in our view, it cannot reasonably create a genuine issue of fact regarding whether Sister Susan was aware that plaintiff had made a complaint to the DOL in March of 1999. See Orsatti v. New Jersey, 71 F.3d at 484; Gray v. York Newspapers Inc., 957 F.2d at 1078. As such, neither Brother Mrozinski's memorandum of November 1998 nor plaintiff's July 15, 1999 letter appear to provide the basis upon which a reasonable jury could find a causal link between plaintiff's complaint to the DOL and Sister Susan's decision to terminate her employment. Accordingly, plaintiff is unable to sustain a prima facie case of retaliation and summary judgment is appropriately granted.

For these reasons, it is recommended that the motion to dismiss Counts II, III and IV of the amended complaint submitted on behalf of defendant (Docket No.21) and defendant's motion for summary judgment (Docket No.24), which pertains to Count I of the amended complaint, be granted.

Within ten (10) days of being served with a copy, any party may serve and file written objections to this Report and Recommendation. Any party opposing the objections shall have seven (7) days from the date of service of objections to respond thereto. Failure to file timely objections may constitute a waiver of any appellate rights.

Respectfully submitted,

/s/ Robert C. Mitchell
ROBERT C. MITCHELL,
United States Magistrate Judge

Dated: May 31, 2002

CONFIDENTIAL!

Concerning **Irene Praobrazhenskaya...**

Irene was paid for one personal day on April 29 and one personal day on April 30, 1998

She switched shifts with another employee and worked on May 12. She is not sure exactly what other day was involved in the shift switch.

Since we paid Irene for April 29 and 30 without her requesting it, she now wants paid overtime for the May 12 and the one other day since she worked over 40 hours during these times where she swapped work days.

My observations and suggestions after talking with Peggy on November 17. . .

We should NOT pay Irene overtime for the hours in question above. This has the potential for opening up similar future problems once "word gets around."

If Irene really pushes the issue, by law, we probably have to pay her overtime because the numbers show she worked over 40 hours even though the verbal agreement among department members is they don't get paid overtime when swapping causes them to work a double shift or over 40 hours in a given time period.

I suggest we give Irene her 2 personal days back and deduct 1 day's pay (8 hours) from each pay period (Nov 15-30 and Dec 1-15).

This would mean Irene would have 4 personal days accumulated as of December 15.

HOWEVER, Irene needs to be reminded about the PERSONAL DAYS policy on page 6 of the Employee Handbook:

> **PERSONAL DAYS.**
> **1. Personal days can be accumulated for one year but are not reimbursable if not taken within the 2 -year period.**

At this point, this means for Irene...

> 4 personal days can be carried into 1999.
> 6 personal days wilt be earned in 1999.
> The total of 10 personal days must be taken by December 31, 1999 or Irene loses them.
> (*Essentially, the personal days must be "zeroed-out" every two years. They cannot be carried along indefinitely.*)

Susan -

Mr. Milburn and I suggest the following rearrangement of paragraphs to make a more natural flow into your final sentence (which we added).

Mr. Milburn would like the lawyer to see this letter before we deliver it just in case we've overlooked some loop hole.

We suspect that Irene will contact you and we suggest you tell her she will get:

2 weeks pay	80 hrs @ $10.33	826.40
3.5 earned P/Ds	28 hrs @ $10.33	289.24
	TOTAL	1,115.24

plus payment for any days worked up to the day of her termination. She has already taken and been paid for her 10 vacation days for 1999.

Mr. Milburn suggests that we not put this monetary information into the letter.

If she refers this to her own lawyer or some outside agency, ALL questions should be answered by our lawyer, not any of us.

Chuck

WHISARD Compliance Action Report

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division

1010392 Invest. Office: Pittsburgh PA District Office

Filing Number: 1999-282-00483
Originating Office: Pittsburgh PA District Office
Registration Date: 03/24/1999
Assignment Date: 03/24/1999
Case Number:
Lead Investigator: Belloma, Donna

Employer Information

Trade Name: Sisters of Mercy Legal Name: Saint Mary Convent
Address: 3333 5th Avenue
Pittsburgh, PA 15213 County: Allegheny

Investigation Information

Period Investigated From: 04/17/1999 To: 03/24/1999
Investigation Method: **Complaint**
Investigation Tool: **Conciliation**
Compliance Status: **Past non-compliance w/future agreement**
Future Compliance Agreed: Y
Recurring Violation: N
Involved in AG: N
Reinvestigation N

Recommended Action:

BCDS: Submit For Opinion:
BW Payment Deadline:
CMP: RO/NO Review:
Trailer forms attached:

Litigation: Follow Up Investigation:

Civil Action Other Action:

Criminal Action Denial of Future Certificate: N

Act	Violation	# EE: Found	Amt. Due
FLSA	Failure to pay proper overtime	1	$81.12
Totals for Act:		1	$81.12

#EEs Agreed	Amt Agreed
1	$81.12

Date:0312411999 Employer Natne:Sisters of Mercy

Case:ID:1010392 Page 1 of 2